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# Abstracts of Recent Cases

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all. It appears illogical to allow tort actions between certain members of the family but not others.

This brings us to the discussion of the principal case. In New York, a parent may not maintain a tort action against an unemancipated child. *Terwilliger v. Terwilliger*, 201 Misc. 453, 106 N.Y.S.2d 481 (1951). However, New York courts do permit such actions by a minor against his unemancipated brother. *Rozell v. Rozell*, 281 N.Y. 106, 22 N.E.2d 254 (1939). In the principal case, the father instituted an action for loss of services and expenses necessarily incurred as a result of the accident. The New York court allowed recovery, relying heavily upon the fact that since the minor son could recover damages and future medical expenses from his minor unemancipated brother, it would result in very little additional family discord to allow the father to recover also. The conclusion of the court has merit and should not be criticized, as it has a controlling precedent (regarding the rights of unemancipated siblings to sue each other) and such precedents should be given due respect. *Talbot v. Riggs*, 287 Mass. 144, 191 N.E. 360 (1934). In the absence of such precedent, which is the situation in the majority of jurisdictions, including West Virginia, it is the opinion of the writer that actions between unemancipated siblings should be denied applying the same reasoning heretofore given for allowing immunity between other members of the family.

It is asserted that tort actions between family members might well result in many cases in family discord and dissension, and there is ever present the imminent danger of fraud and collusion. To allow this type of action would result in the jury members' knowledge of the defendant's coverage by insurance, due to their reasoning that this is probably the only explanation of why family members would be suing each other. It would thus seem that tort actions between family members, including actions between siblings, should not be allowed.

A. M. P.

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## ABSTRACTS

LANDLORD AND TENANT—PERPETUITIES—LEASEHOLD ESTATES.—Lease specified that it should be indefinite and terminated only by tenants inability to pay the monthly rental or his decision to move his business to another location. Tenant agreed and did build building on the property as well as agreeing to keep premises insured.

P, as lessor, notified the tenant to vacate. The tenant declined to vacate and in due time the action was instituted. P contended that the duration of the lease being indefinite violates the rule against perpetuities. The lower court adjudged that the lease created a valid freehold estate approximating a tenancy for life. From an adverse ruling P appealed. *Held*, at common law a lease to be held at the will of the lessee is also held at the will of the lessor. However, when a lessee has a present subsisting interest based on adequate consideration, the common law rule does not apply and the estate is not a mere tenancy at will, but a freehold estate approximating a tenancy for life. The court further held that the lease is not otherwise invalid because the duration is indefinite, and that the lease does not violate the rule against perpetuities. *Conley v. Gaylock*, 108 S.E.2d 675 (W. Va. 1959).

At common law a lease to be held at the will of the lessee, was also to be held at the will of the lessor and could be terminated by either. *Angel v. Black Band Consol. Coal Co.*, 96 W. Va. 47, 122 S.E. 274 (1924); *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W.Va. 84, 34 S.E. 923 (1899). However an exception has been recognized when the lessee has a present interest in leased property based on adequate consideration, whereby it is held that the lease is at the will of the lessee only. *Lovett v. Eastern Oil Co.*, 68 W.Va. 667, 70 S.E. 707 (1911). For a collection of cases see, Annot., 137 A.L.R. 362 (1942).

Under the rule pronounced by the court in the principal case it appears that a just result was reached, but it also appears that the character of the lease was changed by calling it a freehold interest approximating a life estate, although the court was no doubt accorded that right by the precedent of *Newsom v. Meade*, 102 W.Va. 489, 135 S.E. 604 (1926).

Recognizing that the lease amounted to more than a tenancy at will it remains that the intention of the parties in making the lease was not to create a tenancy for life but was to create an interest in the lessee, terminable only at the option of the lessee or on stated contingencies. If the lease is called a life estate, then on the death of the lessee, the lease would terminate. In calling the lease a life estate the court is adding a contingency not stipulated by the parties, namely, that the lease will terminate upon the lessees' death. Also, in designating the leasehold estate as a freehold interest the case presents a questionable issue in that a leasehold estate is commonly designated as a non-freehold interest. Thus it would seem that the

true spirit of the lease would most aptly be reached by designating it so as not to confer upon the lessor the right to terminate the lease until the happening of the stated contingencies.

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**WILLS—CONSTRUCTION—INTENT OF TESTATOR PARAMOUNT AIM.**—Residuary clause in testator's will devised the residue of his estate to three named sisters, with a period following the last sister's name, followed by the language: "or to those who reside at our homeplace, Glenwood, at the time of my death." The sisters pre-deceased the testator and *D*, testator's brother, was living at the homeplace at the time of testator's death. *D* contends that the intention of the testator was for the residue of his estate to devolve upon anyone residing at the homeplace at the time of decedent's death. From an adverse judgment *D* appealed. *Held*, as the sisters predeceased the testator, the devise lapsed and his residuary estate descended by operation of law to his heirs, the *Ps*. The court adjudged the intent of the testator to be to provide solely for the sisters living at the homeplace at his death and not to operate for the benefit of any other person. *Entwistle v. Covington*, 108 S.E.2d 603 (N.C. 1959).

The holding of the principal case represents the effort of courts to adopt constructions which tend to a final disposition of property. This tendency is explained by the general rule that intestacy is not to be favored. *National Bank v. Wehrle*, 124 W.Va. 268, 20 S.E.2d 112 (1942).

The general rule in construing wills is to regard the intention of the testator as the pole star to guide and govern the court and that intention must be given effect, unless it violates some positive rule of law or public policy. *Weiss v. Soto*, 142 W.Va. 783, 98 S.E.2d 727 (1957); *Goetz v. Old Nat'l Bank*, 140 W.Va. 422, 84 S.E.2d 759 (1954). In order to effectuate the testator's intention, it is permissible for the court to transfer words or phrases or to disregard or supply punctuation, as was done in the instant case in holding that only those sisters living at the homeplace at *T*'s death could take. *Bear v. Pitzer*, 131 W.Va. 374, 47 S.E.2d 839 (1948). In construing a will, the intention may be ascertained from the words used by the testator, considered in the light of the language of the entire will and the circumstances existing at the time the will was made. *Young v. Lewis*, 138 W.Va. 425, 76 S.E.2d 276 (1953); *Ball v. Ball*, 136 W.Va. 852, 69 S.E.2d 55 (1952).

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**EVIDENCE—IMPEACHMENT OF WITNESSES BY EXPERT OPINION—PROVINCE OF JURY.**—A witness, known to be a heroin addict for five years, testified that the defendant sold narcotics to him. He also claimed that he had not taken drugs for four months prior to the trial. A doctor, called as a witness for *D*, testified that heroin addicts, being pathological liars, are unworthy of belief. *Held*, that the expert testimony of the doctor was inadmissible in the absence of clear and convincing evidence that this was the consensus of medical and scientific opinion, and that the credibility of witnesses' testimony was the province of the jury. *People v. Williams*, 187 N.Y.S.2d 750, 159 N.E.2d 549 (1959).

The New York court squarely faced the question "whether a doctor may testify that narcotic addicts are unworthy of belief in the sense that they are, in the words of appellate counsel, pathological liars." The court recognized "considerable difficulty" in resolving this question, but after deliberation concluded that expert testimony is inadmissible to establish that narcotic addicts are unworthy of belief, in the absence of a clear showing that such is the consensus of medical and scientific opinion. The authorities are not in agreement on the question. McMORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 45 (1954). Such testimony is generally excluded on the ground that medical opinion is not conclusive that narcotic addiction affects the capacity to tell the truth. *Weaver v. United States*, 111 F.2d 603, 606 (8th Cir. 1940). For a scholarly review of materials on this question, see *Kelly v. Maryland Cas. Co.*, 45 F2d 782 (W.D. Va. 1929).

To the effect that the drug habit may cause a "diseased impairment of the testimonial powers," and that evidence thereon should be received, see 3 WIGMORE, EVIDENCE § 934 (3d ed. 1940). No West Virginia decision on this immediate question is found.

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**ESTATE TAX—EXECUTORS AND ADMINISTRATORS—NOT BOUND TO PLEAD STATUTE OF LIMITATIONS.**—Executors claimed as deductions from the gross estate of the deceased, amounts paid to creditors which were barred by the statute of limitations. Under Pennsylvania law, an executor is not bound to plead the statute of limitations if he is satisfied the claim is honest. However a creditor, legatee, or other person interested in an estate, is allowed the right to interpose the statute of limitations. Tax commissioner invoked the

statute of limitations in order to preserve the size of the estate for estate tax purposes. The Tax Court ruled in favor of the commissioner. *Held*, the INTERNAL REVENUE CODE provides that the net estate for estate tax purposes is determined by deducting from the gross estate such claims as are allowed by the laws of the jurisdiction. As creditors or legatees are permitted to raise the bar of the statute in order to protect their interests or distributive shares, there is no rationale that would justify denying the same to the federal government in its efforts to collect its estate taxes. *Commissioner v. Wolf*, 264 F.2d 82 (3d Cir. 1959).

In West Virginia, "No claim barred by any statute of limitations shall be allowed by a commissioner against the estate of a decedent." W.VA. CODE ch. 44, art. 2, § 12 (Michie, 1955). Under West Virginia law a personal representative is personally liable for failure to plead bar of a statute of limitations against a claim asserted against an estate." . . . if any personal representative . . . pay any debt the recovery of which could be prevented by reason of . . . or lapse of time . . . which he knows, or by the exercise of due diligence could ascertain, the facts by which the same could be prevented, no credit shall be allowed him therefor." W.VA. CODE ch. 44, art. 4, § 13 (Michie, 1955).

Application of the above provisions to the principal case discloses that the West Virginia law is contra to that of Pennsylvania and the problem presented in the principal case would not arise in West Virginia by virtue of the fact that debts barred by a lapse of time could not be paid to secure a deduction for estate tax purposes. West Virginia, as does Pennsylvania, recognizes the right of creditors to appear before the commissioner and contest the claims of each other. *Brewer v. Hutton*, 45 W. Va. 106, 30 S.E. 81 (1898).

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